Stewart Granite Enterprises *and* United Steelworkers of America, AFL-CIO. Case 16-CA-8873

April 3, 1981

DECISION AND ORDER

On January 16, 1981, Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Stewart Granite Enterprises, Frederick, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

[1] Chairman Fanning continues to adhere to the position set forth in his partial dissent in *Spruce Up Corporation*, 209 NLRB 194 (1974), and does not agree with the Administrative Law Judge's comments regarding absence of a successor's duty to bargain over initial terms and conditions of employment under certain circumstances, which circumstances, however, are not present here. Chairman Fanning also finds it unnecessary to distinguish *Cagle's Inc.*, 218 NLRB 603 (1975), for the reasons expressed in his partial dissent therein.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: I heard this case in Frederick, Oklahoma, on July 9, 1980. It arose when United Steelworkers of America, AFL-CIO (herein called the Union), filed original and amended unfair labor practice charges on, respectively, January 9 and February 20, 1980, with the Regional Director for Region 16 of the National Labor Relations Board (herein called the Board), against Stewart Granite Enterprises (herein called Respondent). On February 25, 1980, the Regional Director issued a complaint and notice of hearing against Respondent. In substance, the complaint alleged that Respondent was a legal successor in the operation of a manufacturing plant whose employees were represented by the Union, and that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (herein called the Act), by refusing to recognize the Union as the employees' exclusive collective-bargaining representative when it took over the plant; and compounded those violations thereafter by making unilateral changes in those employees' terms and conditions of employment. The complaint also alleged that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Tom Roberts because of his union activities; and independently violated Section 8(a)(1) of the Act when Respondent's owner, Kenneth Stewart, allegedly made certain post-discharge threats to Roberts. Respondent denies that it had an obligation to deal with the Union in any fashion when it acquired the plant. It denies that Roberts was fired because of his union activities, and it denies that Stewart made any unlawful statements to Roberts during the admitted *contretemps* which took place between the two about a week after Roberts was fired.

All parties had full opportunity to introduce evidence and to make arguments. Both the General Counsel and Respondent filed post-trial briefs, which I have carefully considered. Upon the entire record, including my observations of the witnesses as they testified, I make the following:

FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS

A. *The Successorship Issues*

1. General background

The operation in question is a manufacturing plant in Frederick, Oklahoma, at which granite stones are fabricated into memorial monuments, or gravestones. Until September 4, 1979,[1] when Respondent acquired the plant, the plant had been operated by Century Granite Company (herein called Century), a subsidiary of Coggins Industries, Inc. (herein called Coggins), owned by Frank Coggins. Century also operated 2 nearby granite quarries and has continued to do so since September 4. Century is one of 10 Coggins-affiliated companies engaged around the United States in the quarrying of granite stone and the fabrication of granite monuments. The Coggins operations are largely headquartered in Elberton, Georgia, from which Century's sales, payroll, and other bookkeeping functions are managed. The Coggins companies are, in the aggregate, one of the largest suppliers of rough and semifinished stone in the United States.

Under Century's operation, the Union was the recognized exclusive collective-bargaining representative of Century's production and maintenance employees in a single unit of employees at the Frederick plant and at the above-mentioned quarries.[2] The most recent labor agreement between those parties covering the plant and quarries employees is effective by its terms from August 1, 1978, through July 31, 1981. That contract contains a union-security clause.

In early 1979, Century decided to sell or otherwise dispose of the Frederick plant, but to retain operation of the granite quarries. The Union had notice by at least

[1] All dates are in 1979, unless otherwise specified.

[2] More specifically, in 1969, in Case 16-RC-5164, a predecessor union was certified by the Board as the representative in a single unit of Century's employees at the plant and quarry locations mentioned above, as well as of employees at a third quarry location which is no longer in operation. In 1970, the Union merged with the predecessor representative and it has been the recognized bargaining agent since then.

March 27 of Century's plans to discontinue its own operation of the plant, and of its potential plans to sell it.

In April, Kenneth Stewart entered the picture as a potential purchaser of the plant. Stewart had previously worked for one of the Coggins affiliates, including Century—first as a plant worker at the Frederick plant, and later as a sales representative. He also had extensive experience in the industry through production, sales, and managerial experience with other monument manufacturing concerns. He was also, and continues to be, the owner of a retail monument store in Texarkana, Texas.

After visiting the Frederick plant in April and meeting with Frank Coggins and talking to the plant employees, Stewart began negotiations leading to his eventual purchase of the Frederick plant building,[3] and all of its physical assets, including office equipment, plant machinery, and rough granite inventories, then on hand. He did not acquire any of Century's customer accounts (receivable or payable), nor its business name or "goodwill." The transfer of ownership of the Frederick plant became effective on September 4. As part of the transaction, Stewart also received from Coggins a commitment that Coggins (primarily through Century's nearby quarries) would supply rough granite for Respondent's production needs at guaranteed prices for a period of 1 year, with further price increase limitations for an additional 4-year period.[4]

B. *Pre- and post-takeover plant employee complements*

At the time of the takeover, there were 10 nonsupervisory production and maintenance employees still working at the plant.[5] The plant's complement had diminished steadily since January, at which time there had been about 33 such employees. In the intervening period, many production employees had been laid off and many of those were put to work in one of Century's quarries. Plant production had likewise diminished and, for 2 or more months before the takeover, there had been little or no production. The remaining employees at the plant were engaged in those final 2 months primarily in maintenance, repair, and overall cleanup work in order to get the plant ready for immediate production on Stewart's takeover.

Those remaining production employees suffered no employment hiatus. They were retained when Stewart took over on September 4, along with their supervisors. None of the employees was required to make out any form of "application." Rather, they had been told in advance of September 4 by Stewart that he planned to retain them; the employers had appeared on the September 4 takeover date pursuant to this advance understanding.

On September 4, Stewart assembled the then existing group of former Century employees, together with their supervisors, and gave them a "pep talk," stressing the need for energetic production efforts and attention to quality in the performance of production tasks. Stewart made no specific statements about any changes which he contemplated which might affect the customary wages, hours of work, or other terms and conditions of employment among the plant production employees. The only exception—and then only implicit—is that Stewart addressed the subject of insurance, saying that he intended to ". . . look at several companies to see where we could get the best policy for the least amount of money."[6]

It had been Stewart's plan in advance of the takeover to enlarge the employee complement at the plant in anticipation of increased customer orders under Stewart's revitalized management.[7] As part of those pre-takeover plans, Stewart admittedly planned to draw largely, if not exclusively, from the pool of former plant employees, who had been laid off in the final months of Century's reduced operation of the plant.

As planned, Stewart increased staffing at the plant within approximately a month after takeover to bring its total nonsupervisory production and maintenance force up to approximately 27 employees. Virtually all of those additional hires had been employed at the plant by Century and had been laid off in the final months before the sale of the plant when Century had curtailed production to a bare minimum. At the time of the hearing, the employee complement had been reduced to approximately 17 employees—there having been intervening layoffs when customer orders did not materialize to the extent that Stewart had originally hoped they would.[8]

The evidence affirmatively shows that at any given point prior to at least January 24, 1980, a majority of employees had been employed at the plant by Century prior to Respondent's takeover.[9]

C. Pre- and post-takeover comparison of operations

Under Century's operation, the plant produced unfinished, semifinished, fully finished, and engraved monuments. Of its total output, 60 percent was finished monuments for sale to retail monument stores. Of the remaining 40 percent, consisting of semifinished or unfinished stone, most of that product (about 80 percent) was sold to one of the other Coggins affiliates for additional finishing work. Under Respondent's operation, only fin-

[3] The building was owned by Century, but was situated on land leased from the city of Frederick. Stewart acquired that leasehold interest.

[4] Resp. Exh. 6.

[5] G.C. Exh. 3.

[6] As is further discussed below, the record is silent as to the nature and scope of insurance coverage for employees under Century's operation of the plant. Neither is the labor agreement explicit on this point. Accordingly, it is not clear whether Stewart's remarks to employees on September 4 regarding insurance plans amounted to an announcement of a "change."

[7] Stewart believed that Century had lost customers in Texas and Oklahoma (or had at least lost their goodwill) because of poor quality workmanship and poor service.

[8] Stewart testified, and I find, that he originally augmented the work force to a complement of 27 in order to have sufficient workers to handle the production demands, which he had hoped he could generate by aggressive salesmanship. By mid-November, it became evident that he had been overly optimistic about the volume of orders which he could expect—one unanticipated factor being a general decline in the economy. This caused him to begin cutting back to the complement of 17 who were working at the time of the hearing.

[9] January 24, 1980, was the date on which G.C. Exh. 3, an employee list was prepared. The record is silent as to the number of former Century employees who were still employed in the complement of 17 existing at the time of the hearing.

ished monuments are produced at the Frederick plant.[10] There are no sales to any of the Coggins companies.

From the perspective of the production workers on the plant floor, this change does not appear to have created any substantial differences in working conditions. Those employees still handle, saw, cut, grind, and polish granite stones. Independent of Respondent's decision to confine its production to finished monuments, however, Respondent imposed certain assignment changes which had some impact on the conditions under which production employees worked. Thus, at some unspecified point after takeover, employees who had been previously accustomed to performing only one distinct production task, e.g., operating a saw, were assigned to other jobs a well. In the case of someone who had formerly operated a saw exclusively, that employee may now be assigned, in addition, to operate a crane hoist or some other production machine. This consolidation of previously separate job functions has not derived from anything inherent in the nature of the post-takeover operation; rather, it simply reflected Stewart's management judgment that production would be more efficient and therefore less costly than Century's previous method of assigning work tasks (which method was itself influenced by restrictions in Century's contract with the Union).

It is apparent that the Frederick plant is no longer functioning as an intermediate supply source for Coggins' overall operations, as it was to some degree under Century's ownership. Stewart believed from his own experience in the industry and his familiarity with the regional customer market that he could convince many of the customers for finished monuments in the neighboring region to purchase finished monuments directly from him. He, has thus far, been successful in luring away from Century (or, more probably, from the Coggins operations generally—the record is not clear on this point)[11] about 107 finished product customers formerly serviced by Century (or Coggins' overall operation—see footnote *supra*). In addition, Stewart has secured customer accounts from about another 81 retailers who had not previously purchased Century's (or Coggins') finished products.

The overall Coggins operations used a fleet of trucks to deliver products (both finished and unfinished) throughout the United States. Respondent uses one truck for its more limited volume of customer orders in an eight-state area. Fifty percent of Respondent's customers are in Texas and Oklahoma, and most of the rest are in the southwestern States.

[10] On a projected basis, Respondent will annually sell and ship directly to customers outside the State of Oklahoma products valued in excess of $50,000.

[11] In Stewart's testimony, the terms "Century" and "Coggins" are frequently used interchangeably. Resp. Exh. 1, reflecting over 1000 customers which "Coggins" serviced, has been used by Respondent as a basis for comparison with the number of those customers still serviced by Respondent. Since the evidence does not reflect how many of "Coggins" former customers were, in fact, customers of Century, the comparison is of little or no value in determining the difference in scope as between Century's and Respondent's retail customer market.

D. *The Refusal To Recognize and Bargain With the Union*

It is conceded by Respondent, and the evidence clearly shows, that Stewart intended to take over the plant without assuming any recognitional or contractual obligations to the Union. Stewart admittedly so informed some employees at the Frederick plant even before the takeover. Stewart also declined to recognize the Union when the Union eventually learned that the takeover had been accomplished and when it made a formal demand for recognition and bargaining.

There is this additional background relating to the refusal to bargain with the Union: In April, when Stewart visited the Frederick plant, he met briefly with L. H. Brantley, the Union's sub-district director. Brantley's recollection differs somewhat from Stewart's, but they agree that Brantley at least made reference to the fact that the Union had a labor agreement with Century covering the Frederick plant and that Stewart declined to engage in any substantive discussions with the Union about a future bargaining relationship.[12]

On or about October 15, Brantley returned to the Frederick plant, and, learning that Stewart had taken over its operation, met with Stewart. Stewart admittedly refused Brantley's request to sit down to negotiate a new labor agreement. On October 16, Brantley wrote to Stewart demanding, *inter alia*, that Stewart ". . . recognize this union and accept the contract that was signed and in effect with Century Granite."[13] The letter also suggested the Union's willingness to negotiate and to "resolve our differences on a friendly basis."

Respondent did not reply substantively to the Union's demand in the October 16 letter, nor to subsequent demands, inquiries, grievances, and protests presented in a series of letters from Brantley to Stewart between November 5 and 21.

Analysis, further findings, and conclusions about the successorship questions

Speaking generally, if Respondent's operation of the Frederick plant amounted to a substantially unchanged continuation of the operations formerly conducted there by Century with substantially the same employees, then Respondent may be properly labeled a "successor" to Century, with the attendant obligation to recognize and bargain in good faith with the Union over terms and conditions of employment in the unit of employees for

[12] Brantley states, in addition, that he specifically offered to modify the Century labor agreement to accommodate Stewart as a new owner, and that Stewart expressly stated: "Well, I have been informed that I do not have to accept the Union, and I don't intend to." The conflict is immaterial in the light of my conclusions reached below; although I would credit Brantley, were it important to do so, since Stewart elsewhere admitted that he had no intention of continuing a bargaining relationship with the Union, and he so informed employees who raised the subject with him before the takeover.

[13] While the union contract with Century contained a "recognition" clause purporting to bind Century and its "successors or assigns," the General Counsel expressly disclaimed any contention that Respondent became bound to the Century contract. Instead, consistent with *N.L.R.B. v. Burns International Security Services Inc., et al.*, 406 U.S. 272 (1972), it is contended only that Respondent became bound to a bargaining relationship with the Union by virtue of its plant takeover.

which the Union had exclusive representation rights. As the Court said in *Wiley*:[14]

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship . . . [*Id.* 376 U.S. at 549.]

And in *Burns supra*, the Court adopted the view that among the protections accorded to employees by the Act in successorship situations is the obligation of the successor employer to continue to recognize and bargain with their chosen representative over matters affecting their terms and conditions of employment. Thus, the Court observed and concluded in *Burns*:[15]

> It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer. [*Id.* at 297.]
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> . . . where a bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent[16] there is little basis for faulting the Board's implementation of the express mandates of §8(a)(5) and §9(a) by ordering the employer to bargain with the incumbent union. [*Id.* at 281.]

The issue dividing the parties is whether, under all of the circumstances discussed above, Respondent may properly be treated as a "successor" to Century's preexisting bargaining relationship with the Union, insofar as it covered the Frederick plant.

Since *Burns*, the Board has had numerous opportunities to determine, in specific instances, whether a sale or transfer of a formerly union-represented business operation amounted to a "mere change . . . of ownership" in an otherwise unchanged "employing industry" (in which case successorship obligations attach) or whether, instead, there were features of discontinuity and other changes sufficient to warrant the conclusion that the sale or transfer gave rise to an essentially "new" operation (in which case no bargaining obligation attaches unless and until the union proves that it represents an uncoerced majority of the "new" operation's employees in an appropriate unit). And while it may still be said, as did Judge Leventhal in a pre-*Burns* case, that the ". . . subject of successorship is shrouded in somewhat impressionistic approaches,"[17] the Board has nevertheless offered the following guidelines for determining whether a successorship bargaining obligation attends the sale or transfer of a business operation:

> (1) Whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same plant; (3) whether [the alleged successor] has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment and methods of production; and (7) whether he manufactures the same product or offers the same services.[18]

It is my ultimate conclusion that Respondent's operations at the Frederick plant involved neither a significant discontinuity as between the old and new operations, nor any other features warranting treating it as an essentially "new" business, free of the legal obligations which bound Century to recognize and bargain with the Union.

The principal features which support this conclusion may be stated in brief: Respondent acquired a granite monument manufacturing plant and continued to operate it as such, producing finished monuments, the same product which constituted the majority of Century's output from the plant. Essentially the same customer market (i.e., retail monument stores) is served by Respondent's operation as was served by the majority of Century's output. Most importantly, it was integral to Respondent's takeover plans that the same employees then working in the Century manufacturing operation would be retained, and would be used to perform the same basic production tasks which they had performed under Century's operation. Upon assuming operation of the plant, all production employees then on Century's payroll were retained, and Respondent looked to the pool of former Century plant employees as the primary source of hires as the production force was increased. This reliance on experienced, former Century employees was telling. The jobs

[14] *John Wiley & Sons, Inc.* v. *Livingston President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO*, 376 U.S. 543 (1964).

[15] *Id.* at 279.

[16] Although the Court here alluded to the "recent certification" of the union involved in *Burns*, it has been repeatedly held that when other factors favoring treating an employer as a successor are present, it is of no significance, as herein, that the union may not have been "recently" certified, or that it may owe its exclusive representative status to some lawful process other than a Board certification. See, e.g., *Gardena Buena Ventura, Inc. d/b/a Alondra Nursing Home and Convalescent Hospital*, 242 NLRB 595 (1979), and cases cited, enfd. 89 LC ¶12, 157 (9th Cir. 1980). See also *Valleydale Packers, Inc., of Bristol*, 162 NLRB 1486, 1490-91 (1967), enfd. 402 F.2d 768 (5th Cir. 1968), cert. denied 396 U.S. 825 (1969), cited with approval in *Burns*, 406 U.S. at 293-294.

[17] *International Association of Machinists, District Lodge 94 AFL-CIO, et al. [Lou Ehlers Cadillac and Thomas Cadillac, Inc.]* v. *N.L.R.B.*, 414 F.2d 1135, 1139 (D.C. Cir. 1969).

[18] *Band-Age, Inc.*, 217 NLRB 449, 452 (1975), enfd. 534 F.2d 1 (1st Cir. 1976), cert. denied 429 U.S. 921.

that they were hired by Respondent to perform were not routine or unskilled, but rather, they required special experience, if not expertise. This is strongly suggestive of an attempt by Respondent to continue an existing business enterprise. If Respondent was truly attempting to enter an essentially new business area with a substantially different product, using different methods of production, there would have been little reason to rely so heavily on the Century plant's work force.[19]

The factors on which Respondent would have me rely in reaching a contrary result seem to me to be tangential and ultimately superficial when balanced against the considerations just set forth. Thus, Respondent argues that the unit of plant production and maintenance employees is but a "fragment" of the unit in which the Union had established its representative status (i.e., the overall unit of both Century's plant and quarries employees). But it is established that successorship obligations are not defeated by the mere fact that only a portion of a former union-represented operation is subject to the sale or transfer to a new owner, so long as the employees in the conveyed portion constitute a separate appropriate unit, and they comprise a majority of the unit under the new operation. *Zim's Foodliner, supra* at 1141. *Saks & Co., supra* at 682. See also *Atlantic Technical Services Corporation*, 202 NLRB 169, 175 (1973), and cases cited.

The unit in question under Respondent's operation is a classically appropriate one; i.e., all production and maintenance employees employed at Respondent's single plant. Thus, Respondent's acquisition of the plant did not result in the inappropriate "fragmentation" of a previously homogenous grouping of employees. To the contrary, Respondents' acquisition of the Frederick plant resulted in a separation of former Century employees at the most obvious cleavage line imaginable—the line which separated plant workers from their functionally and geographically distant former brethren working in the quarries still operated by Century.[20]

The fact that Century (through its connections with other Coggins companies) sold products to a nationwide body of customers (including other Coggins affiliates), whereas Respondent has had more modest and geographically limited aspirations in entering the monument manufacturing business, seems almost irrelevant. This has had no demonstrable effect on the terms and conditions under which employees at the Frederick plant have traditionally worked there; and therefore this factor cannot be said to have raised any genuine question as to whether the Union's representative status ought to be continued under Respondent's operation. *Burns, supra; Zim's Foodliner, supra* at 1141.

Respondent further argues that the requisite "continuity" as between Century's and its own operation of the plant was broken by Century's own gradual curtailment of production beginning in early 1979—reaching the point in the final months before Respondent's takeover that virtually no production work was being performed. This, Respondent argues, was a "hiatus" in operations reflective of a clean break between the old and new operations. It is true, as found above, that several months before Respondent acquired the plant facility, Century began phasing out production at the plant, retaining only a core group of employees to perform some limited production and mostly to get the plant ready for immediate operation by a new purchaser.

I believe that this evidence, rather than suggesting discontinuity, reflected a mutual desire on the part of both Century and Respondent to achieve a continuity of operations. Respondent wanted a fully functioning plant, with all production machinery in top condition, requiring only a "press of the button" to begin production upon Respondent's takeover. Respondent also clearly had an interest in Century's retention of a trained and experienced group of workers who would likewise be in a position to perform production work immediately upon Respondent's acquisition of ownership rights.

Normally, the significance of a "hiatus" in operations is that it implies that the former operation has become defunct, former employees have been terminated, and they have begun to acquire other employment; and the purchaser of the facility is therefore required, in effect, to begin anew the process of hiring and other "get ready" work necessary to resume production operations. And it is in this context that a "hiatus" in operations has some bearing on the question whether there has been sufficient change to warrant the new operator's ignoring the historical status of the union as the bargaining representative of employees of the old operation. But where, as here, by prearrangement, employees were retained in the final months of Century's operation for the express purpose of preparing the facility for immediate operation by Respondent, and where Respondent, through Stewart, had prearranged with those employees that they would be kept on, the production "hiatus" had virtually the opposite significance—it was the device by which "continuity" could be maintained. I therefore do not regard the curtailment in production in the final months of Century's operation of the plant as a factor which would favor treating Respondent as a new operation, rather than as a successor to Century.

Respondent cites certain additional changes which it made after takeover which admittedly affected the terms and conditions of employment under which the plant employees worked. Specifically, Respondent points to its

[19] While the other factors set forth in the "guidelines," *supra*, may not be ignored, the hiring by the alleged successor of employees who, in the majority, were employees of the former union-represented operation is almost always treated by the authorities as dispositive in finding a successorship. *Zim's Foodliner, Inc.* v. *N.L.R.B.*, 495 F.2d 1131, 1140 (7th Cir. 1974), cert. denied 419 U.S. 838. Accord: *Saks & Company* v. *N.L.R.B.*, 634 F.2d 681 (2d Cir. 1980).

[20] For this reason, *Nova Services Company*, 213 NLRB 95 (1974), cited by Respondent, is clearly distinguishable from the present case. Neither is the diminution in unit size resulting from the purchase of the plant portion of the former Century operation comparable to the "no-successor" situation involved in *Atlantic Technical Services Corporation, supra*, cited by Respondent. There, the alleged successor took over a tiny portion of what had been previously a massive unit consisting primarily of mechanics and machinists. The unit acquired by the alleged successor, consisting of employees doing mail sorting and distribution, had been brought originally into the larger unit as a voluntarily recognized "accretion" to the overall unit. Apart from the vast numerical differences as between the original unit (about 1100) and the alleged successor unit of mail handlers (about 41), the Board placed special emphasis in concluding that there was no successorship on the fact that no showing of majority sentiment for the union had ever been made in the accreted mail handlers unit. *Id.* at 170. This rationale has no application herein.

previously mentioned consolidation of formerly distinct production tasks, its nominal elevation of hourly wage rates (by rounding up to the next highest 10-cent increment) previously paid by Century to production employees, and its institution of a new plan to replace an existing employee medical benefit program under Century's operation.

First, these changes were insubstantial and neither affected the continuing appropriateness of the plant production and maintenance unit, nor otherwise detracted from the continuity which existed as between Century's and Respondent's operation. *Saks & Co., supra* at 684. Second, and more fundamentally, however, if (as I conclude below) Respondent's duty to recognize and bargain with the Union was perfected as soon as it became clear that former Century employees would comprise the majority of the new operation's employees, it follows that Respondent's changes in these areas were *prima facie* mandatory subjects for bargaining with the Union.[21] Since these changes were unilaterally imposed after Respondent knew that such a majority would be retained, Respondent's invocation of these changes as a factor weighing against finding it to be Century's successor amounts to bootstrapping, and I therefore give no weight to that argument. *Gardena Buena Ventura, supra* at 598, fn. 12.

I have carefully reviewed and considered the applicability of other post-*Burns* cases cited by Respondent in which the Board found no successorship, notwithstanding that the purported successor employed, at some point or another, employees who, in the majority, had worked for the former operation. In those cases, without detailing their elaborate facts, it is evident that unique factors were critical to the Board's respective holdings, even while other factors arguably similar to those present herein were also cited by the Board in reaching the respective results.

In *Norton Precision, Inc., A Subsidiary of Norton Foundries Company*,[22] there was a clean break between the old and new operations. Former employees had been formally terminated and had been out of work for months before being rehired pursuant to general public advertisements for employees by the new operator. The new operation involved the use of substantially different production methods, served an entirely different market, and manufactured product lines which had not been produced by the former operator.

In *Cagle's, Inc.*,[23] the alleged successor was, in reality, a manager for the trustee in bankruptcy (himself an *alter ego* of the "predecessor"), and the Board found it "especially" significant that there had been a hiatus in operations for more than a year before the manager for the trustee in bankruptcy began new operations. *Id.* at 605.

In *Co-op Trucking Company, Inc., and C & E Warehouse, Inc., and S & S Trucking Co., partnership*,[24] the factual setting was also unique. There, the alleged predecessor engaged in a piecemeal dissolution of a trucking business, with some of its delivery functions being taken over by a third party. The alleged successor acquired some of the trucks on a leased basis from the former operation even before the former completely closed down. After the closure of the former business, additional trucks were leased to the alleged successor, as was the former's office and dock area. The new operation had begun to acquire the former's customers even before the former ceased operating, and continued to service only some of the former operator's customers, eventually using a complement of drivers, which consisted in the main of drivers formerly employed by the original operator. The state-issued trucking license was loaned to the new operator at no cost, subject to the former's right to retrieve it at will.

It is therefore evident that, unlike herein, the former operator in *Co-op Trucking* retained important rights including title to the trucking equipment and to the *sine qua non* of the business, the state license to perform trucking services. Herein, Respondent, in a single transaction, acquired full and irrevocable title to the plant building, its equipment, and raw stock; and acquired as much title as Century had possessed in the leased plant site—all factors strongly indicating continuity as between Century's and Respondent's operations.

Respondent would apparently place heavy emphasis on language used by the Administrative Law Judge in his summary rationale as to the successorship issue in *Co-op Trucking, supra*, wherein he states (*id.* at 831) that successorship involves ". . . a 'right' of succession such as would be found in a purchaser or a bidder of a business." While the Board adopted the entire decision of the Administrative Law Judge without comment, the quoted phrase appears to be *dicta* and is misleading as to the state of the law. I am satisfied that the Board's adoption of the Administrative Law Judge's decision in *Co-op Trucking* was not intended to suggest that successorship obligations exist only when a new owner acquires the full panoply of "rights" (customer and supplier relationships, assets, liabilities, and all the other myriad trappings of the former business). If this were the burden of the quoted language, then many of the cases cited above in which successorship obligations were found to have attached would be called into question; and *Co-op Trucking* would deserve greater notice than it has thus far received.[25]

I therefore conclude that by continuing in a materially unchanged manner the operation of the Frederick plant

[21] This feature is more fully elaborated in the next section dealing with the question of Respondent's unlawful unilateral changes.

[22] 199 NLRB 1003 (1972).

[23] 218 NLRB 603 (1975).

[24] 209 NLRB 829 (1974).

[25] It has since been cited only twice in Board annals—each time in administrative law judge decisions, adopted by the Board, for propositions which were unrelated to the successorship issue. *Universal Electric Company, Garland Electrical Contractors, Inc. Larry Russell and David Cowling*, 227 NLRB 1790, 1794 (1977); *Big E's Foodland, Inc.*, 242 NLRB 963 (1979). It was recently cited by a dissenting member of the Circuit panel in *Saks & Co., supra* at 686, as an example of cases in which a majority of predecessor employees were in the new operation without a finding of successorship. But the panel majority in *Saks* clearly downgraded the significance of the absence of a "full" transfer of "assets," observing that this factor did not properly give rise to any supposition that employees' attitudes towards union representation would be changed. *Id.* at 3278. The panel majority additionally quoted with approval the opinion of one commentator that the transfer-of-assets factor really serves only as "make weight" in successorship decisions. *Ibid.*

as a monument manufacturing business and by using employees who in the main had been similarly employed under Century's operation of the plant, Respondent was a legal successor who owed a duty to continue to recognize and bargain with the Union as the exclusive representative of the plant's production and maintenance work force. Since Respondent admittedly has at all times refused to accord such recognition and to engage in such bargaining with the Union, it follows that Respondent violated Section 8(a)(5) of the Act.

Unilateral change allegations

It does not automatically follow from the conclusion that an employer owed a successor's duty to recognize and bargain with the incumbent union that the successor employer must bargain with the union before setting "initial terms" affecting the traditional conditions of employment in the unit. Under *Burns*, an employer may unilaterally establish and implement such initial terms unless it is "perfectly clear" even before the successor has hired his "full complement" that his new operation will employ mostly employees of the predecessor.[26] In the latter instance, the successor-employer's general duty to recognize and bargain with the incumbent union includes the duty to "initially consult" with the union before implementing such changes. *Ibid.*

I conclude that Respondent's assumption of operations at the Frederick plant involved a "perfectly clear" situation within the meaning of *Burns* and, therefore, its duty to bargain with the Union attached or became perfected before it began operations and made any changes in employment conditions. The main evidence on which I here rely is Respondent's acknowledgement through Stewart that he intended to retain the employees working at the plant when, in April, he began negotiations leading to its purchase, that he so informed those employees without conditioning their retention on acceptance of changed terms and conditions,[27] and that he intended to, and did, look to other plant employees who had been recently laid off by Century when he began enlarging the production and maintenance force after takeover. These circumstances dispositively demonstrate that Stewart had no basis for entertaining any genuine doubt as to the representational desires of his putative work force. Accordingly, as to any intended changes affecting working conditions, Respondent owed a duty to notify and bargain with the Union about them before their implementation. Since Respondent could not implement such changes until it became the operator of the plant, and since the evidence shows in any case that certain alleged changes discussed below were not implemented until some point after its own operations had begun, it follows that Respondent's admitted failure to bargain with the Union before their implementation constituted potentially independent or compounded violations of Section 8(a)(5) of the Act.

The only significant question in this area is, therefore, whether the General Counsel sustained its burden of showing by a preponderance of credible evidence that Respondent did, in fact, implement the changes which are alleged in the complaint.

Specifically, the complaint attacks as impermissible unilateral changes only two items: Respondent's admitted institution of a new insurance program and its admitted increasing of hourly wage rates in the plant production and maintenance unit. The transcript additionally suggests that other changes in employees' terms and conditions of employment were effected by Respondent; but these were not addressed in the complaint, and the General Counsel, for undisclosed reasons, expressly disclaimed any intention to challenge them as violative of Section 8(a)(5) or to have them remedied.[28] Accordingly, although there may be incidental evidence suggesting that Respondent unilaterally discontinued pension trust contributions after its takeover, that it merged previously distinct job tasks, and that it failed to follow seniority in a layoff in November (and that the Union made timely and vigorous protests about such apparent changes),[29] the complaint's silence and the General Counsel's disclaimers prevented these matters from being fully litigated. I am therefore precluded from considering them as independent unfair labor practices and/or as factors affecting the scope of the remedy herein.[30]

As to the change in insurance coverage, the proof showed that in Century's labor agreement with the Union, there was a group insurance provision as follows:

> Article 24
> GROUP INSURANCE
>
> Will retain insurance with Blue Cross/Blue Shield, and Paul Revere with benefits as spelled out in the policy if desired.
>
> The Union and the Company agree that if a more desirable plan is available it will be installed with employer and employee each paying one-half the total premium cost, however, weekly disability benefits shall not exceed $60.00 per week.
>
> It is agreed that the Company will provide for its employees a group insurance plan with life, health, hospitalization, surgery, off-the-job accident and major medical coverage. It is understood that the coverage payments of claims under this insurance plan shall be governed solely in accordance with the terms of the Group Insurance Policy.

[26] The employer's qualified right to set "initial terms" assumes a situation in which the union's majority status is in doubt in the initial hiring phase of the new operation, and will not become certain until a "full complement" has been hired. *Burns, supra*, 406 U.S. at 294–295.

[27] Stewart expressly admitted during my questioning of him that he told employees before the takeover became effective that ". . . they would [be] starting out at just what they were making at the time that I took it over." And he further acknowledged that he had not told any employees before they appeared for work on September 4 that he had any plans to change their pay levels or any other conditions of employment. This set of factors plainly allowed employees to draw the "tacit inference" that they would be retained without changes in their wages and other employment conditions, and thereby estopped Respondent from invoking whatever right it otherwise had under *Burns* to unilaterally establish "initial terms." Cf. *Spruce Up Corporation*, 209 NLRB 194, 195 (1974), and *Spitzer Akron, Inc.* v. *N.L.R.B.*, 540 F.2d 841, 845–46 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1970).

[28] Tr. 105:18–106:16. See also Tr. 90:12–91:10.

[29] See, e.g., G.C. Exhs. 7–13.

[30] *Kraft Foods, Inc.*, 251 NLRB 598, fn. 4 (1980), and cases cited.

> It is agreed that the employer and employee shall each pay one-half of the total premium rate of the group insurance provided by the Employer for the employee and his dependents.[31]

There was no additional evidence introduced which would show the nature and scope of the insurance program, or the amount which employees paid as their contributive share towards the premium cost. In addition, the only evidence tending to show that Respondent "changed" the group insurance coverage consists of: (a) Stewart's testimony that he told employees during the "pep talk" given on the day he began operating the plant that he would be looking ". . . at several companies to see where we could get the best policy for the least amount of money;" and (b) Stewart's testimony that his newly-instituted plan was "a little better."

There is no evidence to contradict Stewart's assertion that the insurance plan, which he introduced, was a "little better" than the former one. Rather, it is uncontradicted, as Stewart testified, that the plan was still a "Blue Cross-Blue Shield" plan, and that the employees and Respondent continued to contribute to the premium cost on a 50–50 basis.[32] Accordingly, there is basis for finding that employees were detrimentally affected by the insurance change.

As to the hourly wage change, Stewart admitted that at some point after takeover he caused hourly wages in the plant production unit to be raised by rounding them off to the next highest 10-cent increment, and that he did so without first notifying or bargaining with the Union.

THE REMEDY

Since both changes were concededly made by Respondent on a unilateral basis, they constituted compounded violations of Section 8(a)(5) of the Act and deserve special remedial attention. As to both the insurance and wage changes, I note that the "harm" occasioned by Respondent's actions was not so much to the employees' pocketbooks as it was to their right to have such matters presented to their exclusive bargaining representative before their imposition. But in such cases, the more typical unilateral change remedy of requiring Respondent to rescind the change, make employees "whole," and to bargain in good faith before reimplementing the offending change is inappropriate, since it would permit the use of Board processes to deprive employees of a benefit already conferred.[33] Accordingly, my recommended remedial order provides that Respondent shall rescind the insurance change and the wage increase only if the Union, as the employees' exclusive bargaining representative, requests the same,[34] and omits any requirement that employees be made whole—there having been no proof that the changes in question worked to reduce employees' wage or benefit levels.

[31] G.C. Exh. 5, pp. 17–18.

[32] Credited and uncontradicted testimony of General Counsel's witness Tom Roberts.

[33] *Bellingham Frozen Foods, Inc.*, 237 NLRB 1450, 1467, fn. 30 (1978), enfd. in pertinent part 626 F.2d 674 (9th Cir. 1980).

[34] *Gardena Buena Ventura, supra*, 242 NLRB 595, fn. 1.

A. *Discharge of Tom Roberts and Related Allegations*

1. Introduction and general background

Roberts had been employed for approximately 9 years at the plant under Century's operation (with the exception of an approximately 9-month break in service when he took another job). He had worked at a variety of plant assignments and was familiar with virtually all of the production and maintenance operations. When Respondent took over the plant, Roberts was assigned to work as a mechanic, maintaining and repairing production machinery. He was later reassigned to the polishing operation, and still later, to profiling. He was laid off on Friday, November 16, along with eight other employees whose services were not needed, due to a production lull,[35] but he and the others had the expectation that they would be recalled to work on Monday, November 26, when increased orders were expected to require the recall of all of those laid off on November 16.

After Roberts went into layoff status, however, Respondent decided to discharge him. When Roberts came to the plant during the layoff on Wednesday, November 21, to pick up a paycheck for previous work, he found a note included in his pay envelope which stated:

> Tom:
>
> This is your notice of termination from this company as of 11/21/79.
>
> /s/ Ken Stewart

2. Contentions of the parties

The General Counsel asserts that Respondent discharged Roberts because of his union and other protected concerted activities, all as are discussed in greater detail below; and that Stewart virtually admitted this in post-discharge run-in with Roberts on November 26.

Respondent maintains that Roberts was a chronically sloppy and indifferent employee who had been given a series of assignments which he had consistently failed to perform satisfactorily, and that Roberts was fired after a "last straw" incident on Thursday, November 15, which convinced Stewart and Plant Manager J. C. Neeley that Roberts was beyond redemption. Stewart admits that he had angry words with Roberts on November 26 when Roberts tried to re-enter the plant and speak to other employees, but denies that he made any statements linking his anger at Roberts to any of Roberts' union activities.

3. Roberts' union activities

At a point in August shortly before Respondent acquired the plant, the Union appointed Roberts to the position of president of its local affiliate. There is no evidence that Roberts had played any distinctive role for the Union before then.

On October 15, Roberts accompanied the Union's representative, Brantley, to a meeting with Stewart in

[35] The layoff was solely for legitimate business reasons—at least the General Counsel disclaimed that it involved any features which violated any provisions of the Act.

Stewart's office. It is generally agreed that Brantley sought to induce Stewart to negotiate a new labor agreement with the Union and that Stewart refused, claiming in part that he had legal advice that he was not required to do so. At some point, Stewart also asserted that the employees did not favor the Union and, turning to Roberts, Stewart asked if Roberts wanted the Union. Roberts replied to the effect that he "represented the men" and would "go with what the men want."[36]

Digressing for a moment, the General Counsel argues that it was at this meeting that Roberts forthrightly took a prounion stand and thus distinguished himself as a key figure in the effort to retain the Union. I have some difficulty in accepting this interpretation. It is true that Roberts was brought to the meeting by Brantley as the Union's local president and that he was so identified to Stewart. On the other hand, Roberts, himself, concedes that he went to the meeting "reluctantly" and that, shortly after the meeting ended, he approached Stewart privately to make clear that he ". . . did not sick [sic] Mr. Brantley onto him." It is thus apparent that Roberts was doing his best to minimize his role in the Union. I am therefore more inclined to view his statement in the meeting to Stewart that he would "go with what the men want" as an attempt to portray an attitude of personal indifference to union representation than as a ringing endorsement of it. In short, while Stewart learned in that meeting that Roberts had been designated as the Union's local president, Roberts' actual behavior was not likely to have caused Stewart to believe that Roberts would be a significant force among the employees in any effort to retain the Union.

Thereafter, and until his discharge, I conclude that Roberts did not distinguish himself further as a prounion ringleader. In reaching this conclusion, I reject the vague, uncorroborated, and conclusionary testimony by Roberts that he began "talking up the Union" at some indefinite point after his October 15 meeting with Stewart. Roberts claimed to have done so after Stewart and "leadman" Joe Everett had allegedly tried to talk Roberts out of being for the Union. As examples of Stewart's actions in this regard, Roberts cited only Stewart's comments on October 15 after Roberts had returned to disclaim any responsibility for "sic-ing" Brantley on Stewart. Roberts here attributed to Stewart the remark: "Well . . . without the Union . . . he [Stewart] could pay better wages and this, that and the other." Roberts cited no details of any efforts by Everett to dissuade Roberts from supporting the Union, the totality of his testimony here being: "We talked about the Union." Neither is it clearly established that Everett played any role as Respondent's supervisor or agent.[37] Roberts' claim that he thereafter began to "talk up" the Union among his fellow employees was so lacking in contextual detail and corroboration that it affords no reliable basis for concluding that he was, in fact, a key supporter of the Union.[38] The total absence of any evidence that Respondent was aware that Roberts was engaged in such alleged "talking up" activities further negates the significance of such activities even if they took place.

On Friday, November 16, Roberts telephoned Union Representative Brantley and informed him of the layoff, which had been announced that day or the day before. Brantley asked whether seniority had been followed in selecting the employees to be laid off. Roberts said that seniority had not been followed.

On Monday, November 19, Brantley drafted a letter of protest over the layoff and mailed it to Respondent.[39] The record does not show whether Respondent received the letter before the point on November 21 when Roberts learned he had been fired. In any case, the letter did not indicate that Roberts was the source of Brantley's information, and the record does not otherwise provide a basis for finding that Respondent knew that Roberts had provided the information to the Union.[40]

4. Roberts' work performance

I deal next with Respondent's evidence in support of its defense that it fired Roberts solely for an accumulation of work deficiencies. The evidence recited below is virtually uncontradicted and I therefore credit it.[41] When Stewart took over the plant, he first assigned Roberts to work as a mechanic, responsible for the repair and maintenance of production equipment and machinery. After Roberts had served for about 8 weeks in that capacity, he proved unsatisfactory,[42] and he was given a new assignment in a production job, polishing the tops of monuments after they had been prepared to basic configuration in the "profiling" process.

Roberts proved to be no more satisfactory on this job than he had been as a mechanic. Stewart criticized his work at least twice as he passed through Roberts' work area. Each time, Stewart's criticism was directed at Roberts' failure to polish the stone to a sufficient lustre. In agreement, Neeley commented that Roberts was not willing to take the time needed to do an adequate polishing job—that he would "burn" stones by holding an

[36] Roberts' credited version, not substantially in conflict with those of the other participants.

[37] The only evidence that Everett may have been a supervisor within the meaning of Sec. 2(11) of the Act is in Stewart's testimony that he reassigned Roberts to a polishing job after "head mechanic" Everett reported that Roberts' performance as a mechanic was unsatisfactory and that Everett requested someone who had more experience and could do more adequate welding.

[38] Roberts, never an impressive witness from the standpoint of demeanor, was not convincing in this summary and self-serving portion of his testimony.

[39] G.C. Exh. 10.

[40] Except as the same might be inferred from Roberts' disputed version of the remarks made by Stewart when the two had a confrontation at the plant on November 26. See discussion below.

[41] To the extent that some of the testimony next set forth is in marginal conflict with Roberts' testimony, I reject Roberts' variant versions based on his unimpressive demeanor, his concession, albeit grudging, that Respondent's agents had criticized the quality of his work, and the utter absence of any evidence tending to show that Roberts' work was generally satisfactory.

[42] Stewart testified that Roberts did "poor" and "sloppy" work. Agreeing with this assessment, Plant Manager Neeley, corroborated by Roberts' fellow employee Carl Crosswhite, testified that Roberts' welding work was so poor that his welds did not hold for more than a few days. Neeley also credibly testified that Roberts had failed to clean metal shavings from the cylinder of a polishing mill after replacing its bearings, causing the new bearings to be ruined within an hour after the mill was put back into service. Neeley also credibly testified that Roberts, in his haste to complete another maintenance job, had hammered bearings into place, thereby ruining them.

airgun too close to the surface in an effort to complete a polishing task quickly so that he would have time for coffee before the next stone came from the profiler to Roberts' work area. Similarly, according to Neeley, Roberts would fail to sand down pit holes in the surface so that it was impossible to polish up to the necessary high lustre which customers demanded. George Lopez, the parts supervisor and inspector, credibly testified that "80 to 90 percent" of Roberts' polishing work had to be sent back because it was inadequate to pass final inspection.[43]

As a result, Roberts was reassigned once more—this time to the profiler, where stones were leveled, squared out, and ground to the proper dimensions before being sent to the polisher. Again, by all accounts, his work was poor. Fowler stated: ". . . there is just one word to sum it [Roberts' work] up, and that is 'lousy.'" Fowler credibly testified that he tried to show Roberts the proper way to perform this job, but that Roberts was resentful of criticism. As a result, Fowler finally told Stewart that he ". . . wasn't even going to mess with [Roberts] anymore . . . he wouldn't do what I tell him to anyway." Neeley testified that Roberts had had prior experience under Century's operation as a profiler and had done an adequate job then, but that his performance worsened when he received the new assignment to profiling. Lopez again testified, corroborated by Crosswhite, that "81 to 90 percent" of Roberts' profiling work had to be redone.

5. "Last straw" incident

On Thursday, November 15, Roberts was working as a profiler on a "polish five" monument, i.e., one which required grinding and polishing on all surfaces of the stone. While grinding the top, he noticed that there was a crack in it. Roberts admittedly spent about 2 hours attempting to grind the top down in hopes that the crack would disappear, but realized, he says, that it was impossible when he had ground the monument to below the specified dimensions and the crack was still apparent. Roberts testified that he then informed Johnny Brown about it and that Brown, without criticizing him, simply arranged to use another stone for the order, which was to be shipped the next day.[44]

Shortly after the end of the same workday, Neeley (who had not been previously informed of the incident) made an inspection round and discovered the cracked stone which Roberts had ground to an unusable size. Observing the crack, Neeley determined that it should have been obvious that the stone was unworkable and, therefore, that Roberts should not have wasted 2 hours attempting to grind out the crack.[45] Neeley suspected that Roberts had intentionally wasted the time.

As noted earlier, Roberts was included in the layoff which began the next day, Friday, November 16. Neeley did not report to Stewart his discovery of the cracked stone, which Roberts had ground on November 15, until the following Monday morning, November 19.[46] On hearing this news, Stewart inspected the cracked stone and drew the same conclusion that Neeley had drawn—that Roberts should have known better than to waste 2 hours working on such a flawed stone. Stewart then reviewed with Neeley the fact that Roberts had been reassigned to a series of jobs, each of which he had failed to perform adequately, and asked Neeley whether Neeley thought that Roberts should be terminated. Neeley so recommended and Stewart agreed.

6. The events of November 26

Roberts returned to the plant on Monday morning, November 26, to hand in his hard hat, work uniform, and other work-related gear, and to present Stewart with a written grievance over his discharge.[47]

There was an angry confrontation when Stewart saw Roberts enter the production area. The details are in significant dispute. Roberts recalled it this way:[48] When Stewart approached him, Roberts handed the grievance slip to Stewart. Stewart opened and read it and then folded it and handed it back to Roberts, saying: "I have several of these already on file in the office . . . . I told you this is a nonunion shop." Roberts replied: "This is not what my union contract says." Stewart then "got mad" and said: "Well, *you have been running to the union and telling everything that goes on in this company. Telling tales and spreading lies and this, that and the other. I don't need a man working for me that does these things. I will not have a man working for me doing this. I will not tolerate a man working for me doing this.* I don't want you around my company or I don't want you associating with my men."[49] (Emphasis supplied.) Stewart then told Roberts to turn in his hard hat to George Lopez who was standing about 60 feet away. Roberts walked over to Lopez, placed the grievance in his hard hat and left the hat on a stone for Lopez. Stewart came up again, pulled the grievance from the hat and tore it up and deposited the torn paper in a trash can, saying (or "muttering" as Roberts characterized it): "If I wanted everybody to know my business, I would tell them." Roberts then left the plant.

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[43] Roberts' fellow employees Crosswhite and Fowler corroborated Lopez about the high rate of "re-work" resulting from Roberts' inadequate polishing.

[44] Brown did not testify. The record fails to show whether or not Brown was a supervisor within the meaning of the Act.

[45] Neeley testified, corroborated by Lopez, Fowler, and Stewart, that the crack in the stone started about 6 inches below the top of the facing side and went up across the top and about 6 or more inches down the back side—thus signaling that it was so deep that it could not be ground out. These same witnesses agreed that this should have been obvious to anyone, and that Roberts had sufficient experience, that he should have known better than to waste time attempting to grind out the crack. Roberts states that the crack was not so evidently deep, but he was unconvincing on this point, and I credit the testimony of the others just cited.

[46] Stewart had been in the plant on the morning of November 16, but was absent the balance of the day. Apparently, Neeley had not found the opportunity to tell Stewart about it before Stewart had left for the day at or about noon on November 16.

[47] Brantley, still persisting in his position that the Union represented the employees, had already mailed to Stewart a similar grievance dated November 21, protesting Roberts' discharge and that of another employee who does not figure in this case.

[48] Critical elements of Roberts' version are italicized below for later reference.

[49] Roberts states that his nephew, Cline Howart Roberts (Howard), had left his own work station and happened to walk by at the point that Stewart was making these remarks. Howard, who resides with Roberts, corroborated Roberts. See below.

Stewart recalled it this way:[50] There were not two separate conversations at two separate locations, as Roberts had testified. Rather, there was a single conversation near the roller conveyors near the plant entrance. No other employees were nearby. Specifically, Roberts' nephew Howard never walked by them. Stewart saw Roberts carrying his gear and asked Roberts what he was doing. Roberts said that he wanted to speak with Neeley and another person. Stewart told Roberts that he did not want Roberts in the plant and that Roberts could turn in his gear to Stewart. Roberts then handed Stewart a folded grievance. Stewart tore it up. Stewart explains that he was already angry with Roberts because he had heard from other employees that Roberts was vowing to get his job back and had said (referring to Stewart) that he would "get this SOB." At this point, Stewart said to Roberts: "Tom, I have heard what you have been saying, and you do what you have to do . . . you have told people about the union is going to get your job back. They may, but it will be after I go to court." Stewart also told Roberts that he had known about the cracked stone when he was grinding it and knew that that was why he had been fired, and further opined that the reason that Roberts had not sought to return earlier to protest his discharge was because he knew that he had been in the wrong. He told Roberts that he would not be allowed to talk to other employees or supervisors in the plant, and Roberts left the premises.

Stewart expressly and emphatically denied having made any remarks to Roberts such as those in the italicized portions of Roberts' above-quoted testimony to the effect that Stewart would not tolerate an employee working for him who "told tales to the union."

Roberts' nephew, Howard, testified that he happened to walk by Stewart on his way to get a clean work card from the office since his own had already been filled. Howard states that he heard Stewart say to Roberts that he "was not going to stand having a man working for him who was going to constantly be running to the union with tales of everything that goes on in his plant." This, says Howard, "is all I heard, and I—just as I went by."

Other witnesses called by Respondent were admittedly too far away to hear more than fragments of the exchange between Stewart and Roberts, and their accounts are not directly helpful in resolving the conflict. Each of the others testified, however, that Howard never left his work station some 50 feet from where the exchange was taking place. Lopez went further. Disputing Howard's claim that he happened to walk by because he needed a clean work card from the office, Lopez testified that new cards are put in every morning and "no man can run that profile [Howard's job] and fill that sheet in one day."

It is evident that if Roberts' version were credited, particularly the portions italicized earlier, this would not only reflect considerable hostility on Stewart's part towards Roberts because of his role as the Union's in-house information source, but would also amount to something very nearly like a "confession" that this resentment is what influenced Stewart's earlier decision to fire Roberts (i.e., "I don't need a man working for me that does these things. I will not have a man working for me doing this.").

I am satisfied, however, that Roberts embellished substantially on the exchange, specifically in attributing to Stewart the earlier italicized remarks. I was impressed with Stewart's conviction in denying that he made any such remarks. I am also mindful that such testimony is so convenient to Roberts' case that it should be viewed with extreme suspicion. The alleged coincidental arrival by Howard at the site of the exchange just as Stewart made the self-damning remarks is so inherently unlikely as to warrant the conclusion that Roberts and Howard collaborated on this embellishment. I am convinced on this record that Howard never walked by Roberts and Stewart during their exchanges—neither to get a fresh work card, nor for any other reason.

I therefore find that the exchange occurred essentially as Stewart related it above and that, in any case, Stewart did not make the particular remarks italicized above in Roberts' account.

Concluding Findings

Having credited Stewart's version of his post-discharge encounter with Roberts on November 26, I find nothing in that credited account which has any persuasive relevance in determining whether or not Roberts was earlier discharged for his union activities in violation of Section 8(a)(3) of the Act.[51] I turn now to a review of the other credited evidence to determine whether the complaint may be sustained on the 8(a)(3) allegation.

Considering that evidence, I judge Respondent's defense to be considerably stronger than the General Counsel's *prima facie* case. I have found that Stewart did not intend to recognize the Union when, and at all times after, he took over the Frederick plant. From this, a degree of antiunion animus may be inferred; but it is not necessarily of the type which suggests a predisposition on Stewart's part to weed out union adherents. Stewart stood on what he mistakenly believed to have been his legal right not to continue his predecessor's bargaining relationship with the Union. But he was willing to hire all of the predecessor's employees, including Roberts, even though Stewart knew or must have known that they included persons who favored continuing representation by the Union.

While Roberts was known to Stewart as the designated president of the Union's local, Roberts was not shown to have done anything which Stewart (or Respondent's other agents) knew about, and which Stewart might have regarded as threatening to his desire to remain union-free. While Roberts' discharge occurred after Stewart became aware of Roberts' position as the local president, the discharge did not so swiftly follow

[50] Piecing together Stewart's two accounts—once on adverse examination at the beginning of the hearing and once through examination by his own attorney. The accounts are not discrepant.

[51] Similarly, insofar as the complaint alleges that Stewart independently violated Sec. 8(a)(1) of the Act by " . . . informing an employee in the presence of another employee that he had been terminated for engaging in protected concerted activities," my findings above require that that portion of the complaint be dismissed as unsupported by credible evidence.

Stewart's acquisition of such knowledge as to create a strong inference that the former influenced the latter. In sum, the General Counsel's case, while containing the *prima facie* elements typically deemed essential (but not necessarily sufficient) to a successful discriminatory discharge prosecution—antiunion animus held by the employer, union activities by the employee, knowledge of the same by the employer, and subsequent adverse treatment of the employee—nevertheless requires some stretching to find a violation.

By contrast, Respondent's defensive case has more direct and weighty significance in explaining why Roberts was discharged. There is no doubting on this record that Roberts had been a poor performer since Respondent acquired the plant. There is likewise every reason to believe that Stewart, in his desire to revitalize a moribund manufacturing operation, would not indefinitely tolerate the type of careless and indifferent habits which Roberts had shown.[52] It is moreover significant that Stewart gave Roberts numerous opportunities to find a suitable niche for himself—including for over a month after the October 15 date on which Roberts was revealed as a potential in-house ringleader for the Union—thus negating the suggestion that this event had some influential significance in causing Stewart to decide on November 19 to fire Roberts. Finally, Roberts' seemingly perverse wasting of approximately 2 hours on November 15 in grinding out an evidently useless stone strikes me as a plausible triggering cause for Stewart's decision to discharge him—and not, as the General Counsel would have me conclude, as a mere contrivance or pretext to mask an unlawful motivation.

The General Counsel would have me infer that the November 15 cracked stone incident could not have been the real reason for Roberts' discharge, since it only "cost" Respondent about $10—the amount in wages that Roberts received for performing the useless grinding work. This is an insubstantial point in the light of Roberts' prior history of poor work and Stewart's desire to revive an apparently unprofitable business. The General Counsel further argues strenuously in this connection that Roberts never received a plain and unmistakable warning that he would be discharged if he did not improve. But, wholly apart from the fact that the absence of such a warning is only one of countless factors to be considered in determining an employer's true motive for discharging an employee, this particular argument totally ignores the evidence adduced by the General Counsel herself on cross-examination of Respondent's witness Lopez, the parts supervisor and inspector (stipulated by the parties to be a statutory supervisor), that Lopez had warned Roberts "many, many times" about his poor work, including by "tell[ing] him that he was going to be fired . . . ."[53]

Based on all of the foregoing, I conclude that this is neither a "pretext" nor a "dual motive" case.[54] Rather, Roberts' discharge was solely "for cause" within the meaning of Section 10(c) of the Act.

[52] Stewart had discharged two other employees by the time of the hearing for poor performance on the job, and had discharged at least three others for various reasons relating to unreliability.

[53] Tr. 326–327.

[54] See the Board's discussion in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. An appropriate unit for collective-bargaining purposes within the meaning of Section 9(b) of the Act is:

> All production and maintenance employees at Respondent's Frederick, Oklahoma, plant, excluding office clerical employees, guards, watchmen, and supervisors as defined in the Act.

4. At all times material herein, the Union has been the exclusive collective-bargaining representative of the employees in the above-described unit.

5. Respondent is a legal successor for labor relations purposes to Century Granite Company's operation of the Frederick plant.

6. Since on or about September 4, 1979, and at all times thereafter, Respondent has failed and refused to recognize and to bargain collectively in good faith with the Union as the exclusive representative of Respondent's employees in the above-described unit, and thereby has engaged, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(5) and 8(d), and derivatively, Section 8(a)(1) of the Act.

7. By failing and refusing to notify and to bargain in good faith with the Union before instituting a new hourly wage rate and a new group insurance program affecting the employees in the above-described unit, and by each of said acts, Respondent has engaged, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(5) and 8(d), and, derivatively, Section 8(a)(1) of the Act.

8. Respondent did not violate any provision of the Act by discharging employee Tom Roberts on or about November 21, 1979, nor by any remarks made by Respondent's owner, Kenneth Stewart, to Roberts on or about November 26, 1979.

Insofar as the complaint alleges that Respondent discharged Tom Roberts in violation of Section 8(a)(3) and/or (1) of the Act, the complaint is, *pro tanto*, dismissed.

Insofar as the complaint alleges that Respondent, through Kenneth Stewart, violated Section 8(a)(1) of the Act by remarks made to Tom Roberts on or about November 26, 1979, the complaint is, *pro tanto*, dismissed.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and, acting pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[55]

The Respondent, Stewart Granite Enterprises, Frederick, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to recognize and to bargain collectively in good faith with the Union, United Steelworkers of America, AFL-CIO, as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate herein.

(b) Making changes in the wages, hours of work, or other terms and conditions of employment of said unit employees without first bargaining in good faith with the Union over any such changes.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to remedy the violations found herein and to effectuate the purposes of the Act:

(a) Recognize and, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit found appropriate herein respecting rates of pay, hours of work, or other terms and conditions of employment; and, should any understandings or agreements be reached, upon request of the Union, embody the same in a written and signed instrument.

(b) Upon the Union's request, cancel the unilateral changes it made in the hourly wage rate and the insurance program for unit employees and reinstate the wage and insurance terms which prevailed in the unit immediately before September 4, 1979, all consistent with the considerations and authorities discussed in the section of this Decision entilted "The Remedy."

(c) Post at its Frederick, Oklahoma, plant copies of the attached notice marked "Appendix."[56] Copies of the notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted, and be maintained in all such places for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[55] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[56] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

> To engage in self-organization
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
>
> To refrain from the exercise of any or all such activities.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of these rights.

WE WILL NOT refuse to recognize or bargain in good faith with United Steelworkers of America, AFL-CIO, over terms and conditions of employment in the unit set forth below, and WE WILL NOT change such terms and conditions in that unit unless we have first notified that union of our proposed changes and have given it a reasonable opportunity to meet and bargain with us over such changes.

WE WILL immediately recognize United Steelworkers of America, AFL-CIO, as the exclusive collective-bargaining representative of our employees and, upon request, WE WILL meet and bargain in good faith with it over wages, hours of work, and all other terms and conditions of employment in the unit described below. The bargaining unit is:

> All production and maintenance employees at the Frederick, Oklahoma plant of Stewart Granite Enterprises, excluding office clerical employees, guards, watchmen, and supervisors as defined in the Act.

WE WILL, upon request of United Steelworkers of America, AFL-CIO, cancel the changes we made in wage rates and insurance coverage shortly after we took over the Frederick, Oklahoma plant, and restore the wage levels and insurance coverage which were in effect immediately before we took over that plant.

STEWART GRANITE ENTERPRISES